

103^D CONGRESS
2^D SESSION

H. R. 5135

To amend title I of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to clarify provisions governing fiduciary duties in relation to external benefits, social investing, and economically targeted investments.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 29, 1994

Mr. SAXTON introduced the following bill; which was referred jointly to the Committees on Education and Labor and Ways and Means

A BILL

To amend title I of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to clarify provisions governing fiduciary duties in relation to external benefits, social investing, and economically targeted investments.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Employee Benefit Plan
5 Security and Protection Act of 1994”.

1 **SEC. 2. CLARIFICATION OF SCOPE OF FIDUCIARY DUTIES**
2 **UNDER ERISA.**

3 (a) IN GENERAL.—Section 404(a) of the Employee
4 Retirement Income Security Act of 1974 (29 U.S.C.
5 1104(a)) is amended by adding at the end the following
6 new paragraphs:

7 “(3)(A) In any case in which a fiduciary, in the
8 course of managing a plan or exercising authority or con-
9 trol respecting management or disposition of its assets,
10 has an occasion to choose between any two alternative in-
11 vestments of plan assets, if the fiduciary in making such
12 choice takes into account other factors in addition to the
13 rate of return, the riskiness of the investment, and other
14 direct economic factors, the fiduciary shall not be consid-
15 ered to be discharging the fiduciary’s duties with respect
16 to the plan in accordance with paragraph (1) and section
17 403(c)(1) unless—

18 “(i) the fiduciary has determined in advance
19 that both alternatives are economically equally ad-
20 vantageous to the participants and beneficiaries
21 under the plan, and

22 “(ii) such other factors are taken into account
23 solely to the extent that they would be in the eco-
24 nomic interest of participants and beneficiaries of
25 the plan.

1 “(B)(i) A fiduciary with respect to a plan shall not
2 be considered to be discharging the fiduciary’s duties with
3 respect to the plan in accordance with paragraph (1) and
4 section 403(c)(1) if the fiduciary, in making investment
5 decisions with respect to plan assets, takes into account
6 external benefits.

7 “(ii) A fiduciary shall not be treated as failing to dis-
8 charge the fiduciary’s duties with respect to the plan in
9 accordance with paragraph (1) or section 403(c)(1) solely
10 because such investment yields external benefits.

11 “(iii) For purposes of this subparagraph, the term
12 ‘external benefit’ means, in connection with any invest-
13 ment of plan assets, a benefit to individuals other than
14 participants or beneficiaries under the plan.

15 “(4)(A) Neither the Secretary nor any other agency
16 or instrumentality of the Government of the United States
17 may—

18 “(i) establish or maintain, or cause to be estab-
19 lished or maintained, by means of subsidy or other-
20 wise, any list of investments or classes of invest-
21 ments purporting to satisfy the requirements of
22 paragraph (1) or section 403(c)(1), or

23 “(ii) in any manner pledge, guarantee, ensure,
24 or otherwise represent that any particular invest-
25 ment or class of investments will yield a sufficiently

1 high rate of return at a sufficiently low level of risk
2 to satisfy the requirements of paragraph (1) or sec-
3 tion 403(c)(1).

4 “(B) None of the funds authorized or appropriated
5 to carry out this Act or any other provision of law may
6 be used—

7 “(i) by the Secretary or any other agency or in-
8 strumentality of the United States, or

9 “(ii) by any other institution or entity estab-
10 lished, chartered, or subsidized by the United States,
11 to subsidize, or to otherwise increase the rate of return
12 on, any particular investment or class of investments for
13 the purpose of causing the requirements of paragraph (1)
14 or section 403(c)(1) to be met with respect to such invest-
15 ment or class of investments.

16 “(5) Nothing in this title shall be construed to permit
17 any matter unrelated to the economic interests of partici-
18 pants and beneficiaries under employee benefit plans to
19 be taken into account in determining whether a fiduciary
20 has discharged such fiduciary’s duties with respect to a
21 plan in accordance with paragraph (1) and section
22 403(c)(1).”.

1 **SEC. 3. CLARIFICATION OF SCOPE OF EXCLUSIVE BENEFIT**
2 **RULE UNDER THE INTERNAL REVENUE**
3 **CODE.**

4 (a) IN GENERAL.—Section 401(a) of the Internal
5 Revenue Code of 1986 (requirements for qualification of
6 pension, profit-sharing, and stock bonus plans) is amend-
7 ed by inserting after paragraph (31) the following new
8 paragraph:

9 “(32) ADDITIONAL RULES RELATING TO EX-
10 CLUSIVE BENEFIT RULE.—

11 “(A) IN GENERAL.—The requirements of
12 paragraph (2) shall not be treated as satisfied
13 with respect to a plan, in any case in which a
14 fiduciary, in the course of managing a plan or
15 exercising authority or control respecting man-
16 agement or disposition of its assets, has an oc-
17 casion to choose between any two alternative in-
18 vestments of plan assets, if the fiduciary in
19 making such choice takes into account other
20 factors in addition to the rate of return, the
21 riskiness of the investment, and other direct
22 economic factors, unless—

23 “(i) the fiduciary has determined in
24 advance that both alternatives are eco-
25 nomically equally advantageous to the em-

1 employees and their beneficiaries under the
2 plan, and

3 “(ii) such other factors are taken into
4 account solely to the extent that they
5 would be in the economic interest of the
6 employees and their beneficiaries of the
7 plan.

8 “(B) DISREGARD OF EXTERNAL BENE-
9 FITS.—

10 “(i) IN GENERAL.—The requirements
11 of paragraph (2) shall not be treated as
12 satisfied with respect to a plan in any case
13 in which a fiduciary with respect to the
14 plan, in making investment decisions with
15 respect to plan assets, takes into account
16 external benefits.

17 “(ii) EXTERNAL BENEFITS PERMIS-
18 SIBLE.—The requirements of paragraph
19 (2) shall not be treated as not satisfied
20 solely because such investment yields exter-
21 nal benefits.

22 “(iii) EXTERNAL BENEFIT.—For pur-
23 poses of this subparagraph, the term ‘ex-
24 ternal benefit’ means, in connection with
25 any investment of plan assets, a benefit to

1 individuals other than the employees or
2 their beneficiaries under the plan.

3 “(C) NONINTERFERENCE WITH FIDUCIARY
4 RESPONSIBILITIES.—

5 “(i) PROHIBITION AGAINST LISTS AND
6 OTHER REFERRALS.—Neither the Sec-
7 retary nor any other agency or instrumen-
8 tality of the Government of the United
9 States may—

10 “(I) establish or maintain, or
11 cause to be established or maintained,
12 by means of subsidy or otherwise, any
13 list of investments or classes of invest-
14 ments purporting to satisfy the re-
15 quirements of subparagraph (A), or

16 “(II) in any manner pledge,
17 guarantee, ensure, or otherwise rep-
18 resent that any particular investment
19 or class of investments will yield a
20 sufficiently high rate of return at a
21 sufficiently low level of risk to satisfy
22 the requirements of subparagraph
23 (A).

24 “(ii) PROHIBITION AGAINST SUB-
25 SIDIES.—None of the funds authorized or

1 appropriated to carry out this title or any
2 other provision of law may be used—

3 “(I) by the Secretary or any
4 other agency or instrumentality of the
5 United States, or

6 “(II) by any other institution or
7 entity established, chartered, or sub-
8 sidized by the United States,

9 to subsidize, or to otherwise increase the
10 rate of return on, any particular invest-
11 ment or class of investments for the pur-
12 pose of causing the requirements of sub-
13 paragraph (A) to be met with respect to
14 such investment or class of investments.

15 “(D) IRRELEVANCE OF MATTERS OTHER
16 THAN ECONOMIC INTERESTS OF EMPLOYEES
17 AND THEIR BENEFICIARIES.—Nothing in this
18 paragraph or paragraph (2) shall be construed
19 to permit any matter unrelated to the economic
20 interests of the employees and their bene-
21 ficiaries to be taken into account in determining
22 whether the requirements of paragraph (2) have
23 been satisfied.”.

1 **SEC. 4. EFFECTIVE DATE.**

2 The amendments made by this Act shall apply with
3 respect to acts or failures to act occurring on or after the
4 date of the enactment of this Act.

